No. 87-1269

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

MARCH FONG EU, Secretary of State of the State of California; JOHN K. VAN DE KAMP, Attorney General of the State of California; ARLO SMITH, District Attorney of San Francisco County; LEO HIMMELSBACH, District Attorney of Santa Clara County,

Appellants,

v.

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; STATE CENTRAL COMMITTEE OF THE LIBERTARIAN PARTY OF CALIFORNIA; BERT COFFEY; NANCY WALKER; LINDA POST; DOLPH ANDREWS; CAROLYN WALLACE; MARY KING; THOMAS ROMERO; MARY GINGELL; DAVID E. STURROCK; WALTER LAYSON; MARY VAIL; ROY CHRISTMAN; JAMES FAY; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; and NATIONAL COMMITTEE FOR PARTY RENEWAL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
INTRODUCTION	2
ARGUMENT	5
I THE STATE MAY ESTABLISH ITS PRIMARY ELECTION AS THE EXCLUSIVE MEANS FOR ENDORSEMENT BY A BALLOT-QUALIFIED POLITICAL PARTY OF ITS CANDIDATES IN ORDER TO PROMOTE THE STATE'S INTEREST IN DEMOCRATIC GOVERNMENT AND ITS INTEREST IN STABLE GOVERNMENT ENHANCED BY THE RESULTING CLEAR CHOICES PRESENTED IN THE GENERAL ELECTION.	5
II THE ASSERTION BY PLAINTIFF COUNTY CENTRAL COMMITTEES OF A RIGHT TO ENDORSE INDEPENDENT OF DETERMINATION OF THEIR ROLES BY THEIR RESPECTIVE POLITICAL PARTIES HAS NO SUPPORT WHATSOEVER IN THE RECORD OF THIS CASE.	7
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

	Page
Abood v. Detroit Board of Education, 431 U.S. 209	7
Meyer v. Grant, 108 S.Ct. 1886 (1988)	7
San Francisco County Democratic Cent. Com. v. Eu, 826 F.2d 814 (9th Cir. 1987)	2, 4
Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 107 S.Ct. 544 (1986)	6, 11
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	7

STATUTES

Cal. Elec. Code §§ 8870	3
8940	11
9370	3
9440	11

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APPELLANTS' REPLY BRIEF

INTRODUCTION

Defendants agree with plaintiffs' statement (Brief for Appellees (B.A.) 23) that:

> "This case presents constitutional questions of utmost importance to the self-governing citizens in our democracy."

Plaintiffs characterize the state's interests promoted by the challenged statutes as antithetical to democratic and First Amendment values (B.A. 37):

> ". . . the notion that the state can use its regulatory power over elections to manipulate the parties' political ideology might be appropriate in a totalitarian regime, but never in a democratic system like our own, which values individual thought and expression."

There is no evidence whatsoever in the record of this case that the challenged statutes determine or influence the political ideology espoused by ballot-qualified parties. The Court of Appeals conclusion to the contrary is not supported by any reference to the record of this case. (*San Francisco County Democratic Cent. Com. v. Eu*, 826 F.2d 814, 828 (9th Cir. 1987))

The challenged statutes merely assure to the extent possible by regulation that whatever political ideology or program is adopted by a ballot-qualified political party is determined democratically within the party through the direct participation of all voters who choose to affiliate with it in the primary election. A ballot-qualified party endorses its candidates through majority vote of its members at the primary election; it does not endorse through operation of its official organizations which can never be as representative of the party as the latest primary election results.[1] The proven ability of unrepresentative factions to maneuver themselves into appearing to speak for a group of which they are merely a part is properly subject to regulation by the state to preserve the integrity of the primary and general elections.[2]

There is no evidence in the record below that plaintiffs' political parties want them to make endorsements in the primary election. Plaintiff county central committees, without reference to the record, now assert that they have the right to make endorsements in the name of their political parties over the objections of their parties. (B.A. 27)

The threat to the democratic nature of California ballot-qualified political parties comes not from the challenged statutes but from plaintiffs' attempt to usurp political power through judicial intervention rather than to win it by persuading their fellow party members to bestow it.

The record shows that the challenged statutes reflect the will of the affected political parties and exist to enable the parties to enforce that will in state court. Without the

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1. County central committees which seek to make endorsements are elected in the previous primary election two years earlier. (Cal. Elect. Code, §§ 8870 & 9370) Thus, they are all the more likely to be unrepresentative of the party members who vote in the pending primary.

2. The actions of plaintiffs in this litigation provide examples of this phenomenon. (e.g., Appellants' Opening Brief (Op.Br.) pp. 5, 25-26, n.6) Moreover, defendants provided evidence of the practice of misrepresentation of the views of a county central committee by factions within the committee. (J.A. 66, Rodda dec. ¶ 15)

challenged statutes, unrepresentative factions within a party can prevent the views of the majority from being heard and heeded by official party organizations by simply changing the by-laws without notice in smoke-filled rooms. (Appellants' Opening Brief (Op.Br.) 25-26, n.6)

Plaintiffs make no mention whatsoever in their brief of the effect of the endorsement process on the ability of central committees to carry out their responsibility for the party campaign in the general election which is the principal role assigned to them by their parties.[3] Defendants submitted uncontradicted evidence that the process of endorsement can impair and even eliminate the effectiveness of the county committees to carry on the party's campaign in the general election. (J.A. 62-68; J.S.App.II a-143 - a-145)

———o———

3. Plaintiffs cite only to the Elections Code as the source of their authority to perform party functions but they now attempt to ignore their responsibility for carrying out their parties' campaign in the general election. (B.A. 25, n.24) However, even the Court of Appeals acknowledged that the statutorily recognized role of the committees to carry out the party campaign is the *raison d'etre* of the committees and the source of their status. (*San Francisco County Democratic Cent. Com. v. Eu, supra,* 826 F.2d at 820.)

ARGUMENT

I

THE STATE MAY ESTABLISH ITS PRIMARY ELECTION AS THE EXCLUSIVE MEANS FOR ENDORSEMENT BY A BALLOT-QUALIFIED POLITICAL PARTY OF ITS CANDIDATES IN ORDER TO PROMOTE THE STATE'S INTEREST IN DEMOCRATIC GOVERNMENT AND ITS INTEREST IN STABLE GOVERNMENT ENHANCED BY THE RESULTING CLEAR CHOICES PRESENTED IN THE GENERAL ELECTION.

By quoting him out of context, plaintiffs cite to Professor Tribe for support of their contention that First Amendment doctrine precludes state regulation of political parties. (B.A. 43) Read in more complete context it appears that Professor Tribe believes that First Amendment doctrine does and should permit such regulation by states.

After providing the admonition quoted by plaintiffs, Professor Tribe goes on to describe the necessity for government regulation of the election process including "ballot access by independent candidates and political parties [and] conduct during the campaign". (L. Tribe, *American Constitutional Law* 1097 (2d ed. 1988)) He demonstrates the need for federal constitutional law to accommodate the symbiotic relationship between states and ballot-qualified political parties (Ibid. pp. 1118 & 1121):

> "Political parties exhibit many of the attributes of ordinary voluntary associations and yet seem imbued with a quasi-governmental character. While this hybrid aspect of political parties has left uncertain the extent to which constitutional strictures bind their conduct, it is clear that to the extent the law delegates

to political parties roles that fit significantly into official electoral or other governmental processes, their claims to private autonomy necessarily give way not only to governmental regulatory power, [omitted ftn. cites to *Marchioro v. Chaney*, 442 U.S. 191 (1979)] but also to the direct application of federal constitutional norms. (ftn. omitted)

"……

"Every state grants access to the general election ballot to the nominees of political parties that satisfy certain conditions, conditions that typically differ from those that independent candidates must satisfy. In effect, therefore, the state delegates to the political party the decidedly governmental function of determining who may gain a place on the ballot. [ftn. omitted] Notwithstanding the failure of the Supreme Court to formulate the governing principle, it thus seems clear that those actions of a political party integrally involved in the selection of a candidate for public office should be treated as state action when the state incorporates the party's choice by conferring some political benefit, such as preferential ballot access, upon that candidate."

As this Court reiterated in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S.Ct. 544, 554, ftn. 13 (1986), a state has a compelling interest " 'of confining each voter to a single nominating act' ". Plaintiff county central committees seek the right to speak for their respective parties as to the identity of the parties' candidates for partisan office prior to the primary election. Plaintiffs have been claiming a right of representative speech which is inherently fraudulent because the party speaks for itself in a democratic forum provided by the

state.[4] The state has a right consistent with the First Amendment to prohibit such speech to preserve the integrity of its electoral system, to protect the clarity of the message provided by the party at the primary election and to preserve that message as a clear choice on the general election ballot. (See, Op.Br. 42-43)

II

THE ASSERTION BY PLAINTIFF COUNTY CENTRAL COMMITTEES OF A RIGHT TO ENDORSE INDEPENDENT OF DETERMINATION OF THEIR ROLES BY THEIR RESPECTIVE POLITICAL PARTIES HAS NO SUPPORT WHATSOEVER IN THE RECORD OF THIS CASE.

As Justice Marshall so aptly stated in dissent on behalf of Justices Brennan and Blackmun in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 295 (1986):

> "When this Court seeks to resolve far-ranging constitutional issues, it must be especially careful to ground its analysis firmly in the facts of the particular controversy before it."

As plaintiffs tacitly acknowledge by their desperate efforts to supplement the record below (B.A. 17-18), that record does not support the invalidation of the challenged

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4. "Representative speech" is not "core political speech" which is entitled to heightened protection as applied in *Meyer v. Grant*, 108 S.Ct. 1886, 1892 (1988). "Representative speech" is subject to regulation to assure that it is "representative". (Cf. *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-236 (1977) [a union has no right to political speech on behalf of members who do not consent].)

statutes.[5] However, even if the record could be supplemented before this Court, it would demonstrate that plaintiffs have no basis for their claim that they speak for their parties with regard to the rights which they claim for themselves.

After appeal was taken to this Court, the state central committees of the California Democratic and Republican parties adopted by-law amendments which deny their county central committees the right to make endorsements of candidates for the party nomination. (Addendum to Motion to Affirm or Dismiss (M.A.D. Add.) 86a, Bell dec. exh. A; 98-105, Kelly dec. exh. A)

The by-law amendments adopted by the Republican State Central Committee were voted upon by the entire Central Committee in convention and prohibit any endorsements in contested primary elections by any Republican central committee including itself. (M.A.D. Add. 73a,

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5. Defendants have pointed out the insufficiency of the record at every stage of the proceedings in this litigation. (Statement of the Case, Op.Br.) Apparently assuming that no one will read the record, both the plaintiffs and the Court of Appeals assert that defendants only concern with the adequacy of the record relates to whether the plaintiff committees actually authorized participation in this litigation and to whether the major political parties supported the challenged statutes when they were enacted. (826 F.2d at 822, n.17, 822-823; B.A. 3-4, 13-15) Defendants made efforts to acquire information directly from the Republican and Democratic state central committees, which are not parties to this litigation, regarding their positions and records concerning the challenged statutes at the time of their enactment through the present. (J.A. 72-73, Graybill dec. ¶¶ 5-8) Defendants sought from plaintiffs all information they may have received from the state central committees on these issues in preparing this litigation. (J.A. 71, 76, Graybill dec. and exh. thereto)

Bell dec. ¶ 4) There is nothing in the record of this case to indicate that statutory changes in the composition of the Republican State Central Committee have not always been preceded by corresponding amendments to the by-laws such as are set forth at M.A.D. Add. 76a-86a, Bell dec., exh. A.

In sharp contrast with the Republican State Central Committee action, the by-law changes for the Democratic State Central Committee were not accomplished by vote of the entire central committee but by the "smoke filled room" method described at Op.Br. 25-26, n.6. (M.A.D. Add. 93a-94a, Kelly dec. ¶ 3) The amendments provide for endorsement in the name of the party pursuant to a process controlled by the state central committee. Contrary to the implication by plaintiffs (B.A. 45), neither the record below nor as plaintiffs have tried to supplement it indicates that the Democratic State Central Committee has amended its by-laws regarding the composition or leadership of the Committee.

Neither plaintiffs nor the courts below explain by reference to the record of this case how plaintiffs can claim the right to endorse when they were elected at the primary election with the clear and long-standing understanding that they had no right to do so as a committee or in the name of those who elected them. The opinions of the courts below are replete with echoes of the plaintiffs' assertions that providing them with the right to endorse is in the best interests of their parties. However, the record is barren of evidence that the parties have taken any official action manifesting concurrence with that view.

Without any support in and, consequently, with no reference to the record of this case, plaintiff Democratic and Republican county central committees now claim they had the "right to endorse, support, and oppose candidates in party primary elections until 1963, when the California legislature enacted the predecessor to section 11702 . . .". (B.A. 24)

The record establishes that the committees have never been granted that right by the California Democratic and Republican parties because it is antithetical to the principle of party member sovereignty and counter-productive to the established role of the committees. That role has been to conduct the parties' campaigns in the general election for their candidates selected at the primary election. (J.A. 62-68, Rodda Dec. ¶¶ 8-18; and J.S.App.II a-143 - a-145, 23 Ops.Cal.Atty.Gen. 119 (1954))

Plaintiff county central committees further claim the right under the First Amendment to make endorsements "[w]hatever position a particular political party may take at any given time" on their right to do so. (B.A. 28) Plaintiffs contend that the First Amendment precludes their respective political parties from prohibiting their making endorsements in the primary elections in order to preserve their effectiveness in carrying out the parties' campaigns in the general election. (Id.)

However, the only basis for the county committees' assertion of status independent of their respective political parties is that they are specifically recognized by the California Elections Code which, inter alia, provides for their organization and election. (B.A. 27) There is no reference to any source of legitimacy or charter of existence other

than statute. Those same statutes also preclude plaintiff county central committees from making endorsements and subordinate them to their respective state central committees in the performance of their principal role of carrying out their respective party campaigns for its candidates in the general election. (Cal. Elec. Code §§ 8940 & 9440)

By invalidating the statutes banning endorsements, the lower courts have violated the admonition of this Court reiterated in *Tashjian*, 107 S.Ct. at 554:

> "'And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.'"

On the record of this case it simply cannot be determined that invalidation of the statutes has not actually deprived the affected political parties of political rights of speech and association protected by those statutes and the First Amendment.

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CONCLUSION

For the reasons set forth herein and in their opening brief, defendants respectfully request that the decision of the Court of Appeals be reversed.

DATED: October 10, 1988

Respectfully submitted,

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